



# MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 10-48  
Preliminary Plan No. 120090400  
Willerburn Acres  
Date of Hearing: April 22, 2010

JUL 22 2010

## MONTGOMERY COUNTY PLANNING BOARD

### RESOLUTION

WHEREAS, pursuant to Montgomery County Code Chapter 50, the Montgomery County Planning Board ("Planning Board" or "Board") is vested with the authority to review preliminary plan applications; and

WHEREAS, on June 26, 2009, Berman Enterprises ("Applicant"), filed an application for approval of a preliminary plan of subdivision of property that would create 5 lots on 3.99 acres of land in the R-90 zone, located in the northeast and southeast corners of the intersection of Seven Locks Road and Gainsborough Road ("Property" or "Subject Property"), in the Potomac Subregion master plan area ("Master Plan"); and

WHEREAS, Applicant's preliminary plan application was designated Preliminary Plan No. 120090400, Willerburn Acres ("Preliminary Plan" or "Application"); and

WHEREAS, Planning Board staff ("Staff") issued a memorandum to the Planning Board, dated April 10, 2010, setting forth its analysis, and recommendation for approval, of the Application subject to certain conditions ("Staff Report"); and

WHEREAS, following review and analysis of the Application by Staff and the staff of other governmental agencies, on April 22, 2010, the Planning Board held a public hearing on the Application (the "Hearing"); and

WHEREAS, at the Hearing, the Planning Board heard testimony and received evidence submitted for the record on the Application; and

WHEREAS, on April 22, 2010, the Planning Board approved the Application subject to certain conditions, on motion of Commissioner Dreyfuss and seconded by Commissioner Alfandre with a vote of 5-0; Commissioners Alfandre, Dreyfuss, Hanson, Presley and Wells-Harley voting in favor.

NOW, THEREFORE, BE IT RESOLVED, that pursuant to the relevant provisions

Approved as to  
Legal Sufficiency:

8787 Georgia Avenue, N.C. Planning Commission, Legal Department 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320

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of Montgomery County Code Chapter 50, the Planning Board approved Preliminary Plan No. 120090400 to create 5 lots on 3.99 acres of land in the R-90 zone, located in the northeast and southeast corners of the intersection of Seven Locks Road and Gainsborough Road, in the Potomac Subregion master plan area, subject to the following conditions:

- 1) Approval under this preliminary plan is limited to five residential lots.
- 2) Compliance with the conditions of approval of the Preliminary Forest Conservation Plan. The applicant must meet all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permit(s) as appropriate.
- 3) The Applicant must comply with the noise mitigation measures outlined in the Environmental Staff Memorandum dated March 29, 2010.
- 4) The applicant must dedicate all road rights-of-way shown on the approved preliminary plan to the full width mandated by the Master Plan unless otherwise designated on the preliminary plan.
- 5) The Applicant must comply with the conditions of the Montgomery County Department of Permitting Services (MCDPS) stormwater management approval dated June 16, 2009. These conditions may be amended by MCDPS provided the amendments do not conflict with other conditions of the preliminary plan approval.
- 6) The Applicant must comply with the conditions of the Montgomery County Department of Transportation (MCDOT) letter dated February 19, 2010. These conditions may be amended by MCDOT provided the amendments do not conflict with other conditions of the preliminary plan.
- 7) The certified preliminary plan must contain the following note: "Unless specifically noted on this plan drawing or in the Planning Board conditions of approval, the building footprints, building heights, on-site parking, site circulation, and sidewalks shown on the preliminary plan are illustrative. The final locations of buildings, structures and driveway will be determined during the building permit process. Please refer to the zoning data table for development standards such as setbacks, building restriction lines, building height, and lot coverage for each lot. Other limitations for site development may also be included in the conditions of the Planning Board's approval."
- 8) The Adequate Public Facility (APF) review for the preliminary plan will remain valid for eighty-five (85) months from the date of mailing of the Planning Board resolution.
- 9) Other necessary easements must be shown on the plat.

BE IT FURTHER RESOLVED, that having given full consideration to the recommendations and findings of its Staff as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein) and

upon consideration of the entire record, the Montgomery County Planning Board FINDS, with the conditions of approval, that:

*1. The Preliminary Plan substantially conforms to the master plan.*

The Potomac Subregion Master Plan (2002) recommended the continuation of the R-90 zone for the Property and nearby properties in recognition of, and to accommodate, the existing development patterns that had been established in this area. The Master Plan makes no specific recommendations for this Property. As such, the Board finds that the creation of lots for one family dwellings in conformance with the R-90 zoning designation is in conformance with the Master Plan recommendations.

*2. Public facilities will be adequate to support and service the area of the proposed subdivision.*

The proposed use will generate less than 30 vehicle trips during the morning or evening peak-hour, and therefore, the application is not subject to Local Area Transportation or Policy Area Mobility Review. Sidewalks are being provided along Gainsborough Road and will connect to the sidewalks, where they exist, on Seven Locks Road. Through a covenant with the Montgomery County Department of Transportation (MCDOT), future property owners of the lots fronting on Seven Locks Road will be required to pay a pro-rate share of future improvements to Seven Locks Road. The extent of those improvements is not fully known at this time but will likely include completion of the sidewalk along the Seven Locks Road frontage of the Property among other items. The applicant is also required to dedicate and widen Gainsborough Road and provide an additional 8 foot wide parking lane to accommodate 11 parallel parking spaces on the south side of Gainsborough Road. The Board finds that proposed vehicle and pedestrian access for the subdivision will be safe and adequate.

The application has been reviewed by all local utility agencies (gas, electric, and telecommunications) who have recommended approval of the plan because their respective utility, if available, can adequately serve the development. Other public facilities and services, such as schools, police stations, firehouses and health services, are operating within the standards set by the Growth Policy Resolution currently in effect. The Property is not subject to payment of a School Facilities Payment; the local school cluster is operating within acceptable levels. The Board finds that all other public facilities and utilities are adequate to serve the proposed development

*3. The size, width, shape, and orientation of the proposed lots are appropriate for the location of the subdivision.*

The application has been reviewed for compliance with the Montgomery County Code, Chapter 50, the Subdivision Regulations. The application meets all applicable sections and with the subdivision waiver, as discussed below, meets the resubdivision criteria. Staff has reviewed the proposed lot size, width, shape and orientation and finds them to be appropriate for the location of the subdivision.

4. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A.*

#### Forest Conservation Variance

Section 1607(c) of the Natural Resources Article, MD Ann. Code identifies certain individual trees as high priority for retention and protection. If a forest conservation plan cannot be altered to protect these trees, the Applicant is required to demonstrate that it qualifies for a variance in accordance with Section 22A-21 of the Montgomery County Code to remove them. In general, law requires the retention and protection of all trees that measure 30" DBH and greater; trees that are 75% the diameter of the county champion for that species; and rare, threatened and endangered species. Since this project will require one tree greater than 30 inches DBH to be removed and will impact the Critical Root Zone (CRZ) of another large tree, a variance is required. The large tree that is requested to be removed is identified on the Preliminary Forest Conservation Plan as Tree #10 which is located in the center of proposed lot #59. It is a 34" DBH white pine (*Pinus strobus*) listed in good condition. Tree #11 will have some Critical Root Zone (CRZ) impacts and the applicant is proposing tree preservation measures to help ensure the tree survives construction. Tree #11 is located just off-site to the south of the property and is a 43" DBH white pine (*Pinus strobus*) listed in good/fair condition.

In accordance with Montgomery County Code Section 22A-21(c), the Planning Board referred a copy of the variance request to the County Arborist in the Montgomery County Department of Environmental Protection for a written recommendation prior to acting on the request. The County Arborist has elected not to review the variance request. The County Arborist's recommendation for the variance request is, therefore, presumed to be favorable.

In accordance with Section 22A-21(e), the Planning Board makes the following findings required to grant the variance.

- a) Will not confer on the applicant a special privilege that would be denied to other applicants.

The tree in question will most likely become a hazardous tree if it is required to remain in place. Therefore, staff believes that is not a special privilege that would be denied to other applicants.

b) Is not based on conditions or circumstances which are the result of the actions by the applicant.

The site layout and design necessitates the removal of the 34" DBH white pine (*Pinus strobus*) since this tree will likely become a hazardous tree following the removal of the CRZ and the proposed grading for the proposed houses.

c) Does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property.

The requested variance is a result of the proposed site design and layout on the subject property and not as a result of land or building use on a neighboring property.

d) Will not violate State water quality standards or cause measurable degradation in water quality.

The tree proposed to be removed would most likely not survive once the CRZ has been impacted. As such, the removal of this tree is not considered to have an adverse impact on the water quality standards or degradation in water quality.

As a result of the above findings, the Board approved the applicant's request for a variance from Forest Conservation Law to remove the 34" DBH white pine (*Pinus strobus*) and impact the CRZ's of tree #11.

#### Forest Conservation Plan

The forest conservation requirement on the 3.99 acre net tract equals 0.80 acres of afforestation. To meet this requirement, the Preliminary Forest Conservation Plan shows the entire requirement being met off-site. This project proposes to create five lots with an average size of 0.79 acres. Staff supported the applicant's request to take the planting requirements off-site since the lots are relatively small, there are no environmentally sensitive areas/priority planting areas on-site, nor is there adjoining protected forest. The Board agreed with staff and finds the plan is in compliance with Chapter 22A.

- 5. The Application meets all applicable stormwater management requirements and will provide adequate control of stormwater runoff from the site. This finding is based on the determination by the Montgomery County Department of Permitting Services ("MCDPS") that the Stormwater Management Concept Plan meets MCDPS' standards.*

The application has an approved stormwater management concept dated June 16, 2009. The concept consists of non-structural water quality control measures. Channel protection measures are not required because post development flow does not exceed 2.0 cubic feet per second. The Board finds that the application meets the requirements of Chapter 50-24(j) for stormwater management.

- 6. The proposed lots are of the same character as to street frontage, alignment, shape, width, and suitability for residential use as other lots within the existing neighborhood (as delineated by Staff in the Staff Report) ("Neighborhood"), as analyzed below. A Subdivision Regulation Waiver was granted that provided relief from the size and area requirements of Section 50-29(b)(2).*

Size:

See Section 7 below, for a discussion of the Subdivision Regulations Waiver.

Width

Lot widths in the Neighborhood range from 78 feet to 242 feet. The proposed lots vary in width from 116 to 197 feet and, therefore, the Board found that they will be in character with existing lots in the Neighborhood with respect to width.

Frontage

Lot frontages in the Neighborhood range from 25 feet to 204 feet. The Proposed lots will have frontages that range from 116 feet to 197 feet. The Board finds that the proposed lots will be of the same character as existing lots in the Neighborhood with respect to lot frontage.

Area: See Section below for discussion of Subdivision Regulations Waiver.

Alignment:

In the 60 lot Neighborhood, all lots except 5 align perpendicularly to the street line in either a corner, radial or standard perpendicular fashion. All of the proposed lots have standard perpendicular alignments to the street. The Board finds that the proposed lots are of the same character as existing lots with respect to the alignment criterion.

Shape:

There are a wide variety of lot shapes in the Neighborhood including rectangular, trapezoids, and irregular shapes. The proposed lots are rectangular and irregular. The Board finds that the shapes of the proposed lots will be in character with shapes of the existing lots.

Suitability for Residential Use:

The existing and the proposed lots are zoned residential and, therefore; the lots are suitable for residential use.

*7. Subdivision Regulations Waiver, 50-38*

The resubdivision analysis in the Staff Report advised that proposed Lot 11 will have the largest dimensional characteristics with respect to size and buildable area (area) for all lots within the Neighborhood and recommended a Subdivision Regulation Waiver pursuant to Section 50-38 of the Subdivision Regulations to provide relief from these two criteria. The Report suggested that without a waiver of the size and area criteria, it was not possible to find that the application would conform to the Resubdivision Criteria found within Section 50-29(b)(2) of the Subdivision Regulations.

The Planning Board has the authority to grant such a waiver pursuant to Section 50-38(a)(1) of the Subdivision Regulations provided certain findings can be made. The section states:

*“The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.”*

The waiver request pertained only to Lot 11 and it was staffs' belief that a practical difficulty existed due to the fact that the house is currently built across the common boundary line of part of lot 2 and unplatted, Parcel 615. The driveway serving the house crosses on to part of Lot 1. This assemblage of property also abuts a previously abandoned portion of right-of-way and all mentioned properties are under common ownership of the applicant. The Staff Report suggested that the preliminary plan drawing represented the most reasonable configuration of Lot 11 that accommodates the existing improvements and consolidates the abandoned right-of-way into a single lot.

Proposed Lot 11 shown on the preliminary plan drawing will be the largest lot with respect to size and area and, as the Staff Report noted, this has historically been reason to find a proposed lot(s) out of character with other lots in a Neighborhood, thereby failing the resubdivision test. However, given the size and location of the house, staff believed that there are no better options that would result in a more logical lot around the house than Proposed Lot 11. As Staff explained, to suggest that it might be possible to exclude some of the land around the house to create a smaller lot would leave "leftover" partitions of land that could not be consolidated into any other adjacent properties without running afoul of other resubdivision criteria and it would impact existing improvements that the Applicant has no intention of removing.

The Staff Report also noted that in order to receive a building permit, if necessary in the future<sup>1</sup>, the partitions of land around the house would need to be platted as a single lot following a review of a preliminary plan of resubdivision. These same issues would be before the Board for consideration, although the size and area of that lot would be even greater than what is proposed under this application. This circumstance was professed by Staff to further demonstrate that a practical difficulty would exist in more than one scenario.

Staff found that a practical difficulty exists and that in order to assemble the properties already encumbered by the existing house, into Lot 11 a waiver was necessary and that it was the minimum necessary to provide relief from the size and area requirement. Staff also believed that the waiver was not adverse to the objectives of the General Plan and not adverse to the public interest. Staff noted that plan was distributed to the members of the Development Review Committee and there were no objections to the size and area of Lot 11.

After consideration of this Subdivision Regulations Waiver request, the Planning Board concurred with Staff and finds that a Subdivision Regulations Waiver should be granted. The Board finds that a practical difficulty does exist; it is the minimum necessary to provide relief from the requirements; that it is not inconsistent with the purposes and objectives of the General Plan; and that it is not adverse to the public interest. All required findings have been made pursuant to Section 50-38(a)(1) and the Planning Board recommends approval of a waiver of Section 50-29(b)(2) for size and area only.

BE IT FURTHER RESOLVED, that this Preliminary Plan will remain valid for 60 months from its Initiation Date (as defined in Montgomery County Code Section 50-35(h), as amended) and that prior to the expiration of this validity period, a final record plat for all property delineated on the approved Preliminary Plan must be recorded

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<sup>1</sup> A building permit is not necessary at this time but would be to replace or significantly add on to the house



among the Land Records of Montgomery County, Maryland or a request for an extension must be filed; and

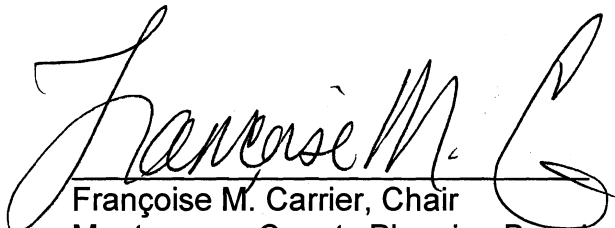
BE IT FURTHER RESOLVED, that this Resolution constitutes the written opinion of the Planning Board in this matter, and the date of this Resolution is 22 2010 (which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED, that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

\* \* \* \* \*

CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission on motion of Commissioner Dreyfuss, seconded by Commissioner Wells-Harley, with Commissioners Alfandre, Dreyfuss, and Wells-Harley voting in favor of the motion, and with Chair Carrier abstaining and Commissioner Presley absent, at its regular meeting held on Thursday, July 15, 2010, in Silver Spring, Maryland.

  
Françoise M. Carrier, Chair  
Montgomery County Planning Board